

No. 88-1640

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Supreme Court, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, et al.
Petitioners,

v.

RICHARD THORNBURGH,
UNITED STATES ATTORNEY GENERAL, et al.
Respondents.

**ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT**

**BRIEF IN OPPOSITION OF RESPONDENT
DETROIT FREE PRESS, INCORPORATED**

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RESTATEMENT OF QUESTION PRESENTED

1. Was the Attorney General, applying the settled construction of the Newspaper Preservation Act, arbitrary and capricious in concluding that the Detroit Free Press was "in probable danger of financial failure," where the paper:

- had sustained increasing operating losses totaling \$81 million between 1979 and 1986;
- would have failed long ago without cash infusions totaling \$176 million from its corporate parent;
- could pursue no unilateral business strategy that would return it to profitability;
- trailed The Detroit News significantly in advertising and circulation;
- had battled the News for leadership in Detroit for well over a decade;
- had not engaged in improper marketing practices or mismanagement; and
- would close if the joint operating arrangement with the News were denied?

RULE 28.1 STATEMENT

As required by Supreme Court Rule 28.1, Respondent Detroit Free Press, Incorporated hereby states (1) that it is a wholly-owned subsidiary of Knight-Ridder, Inc.; (2) that it has no subsidiaries other than wholly-owned subsidiaries; and (3) that its affiliates (excluding wholly-owned subsidiaries of Knight-Ridder, Inc.) are the following subsidiaries and other entities that are partially-owned by Knight-Ridder, Inc.: the Seattle Times Company; Southeast Paper Manufacturing Company; Ponderay Newsprint Company; TKR Cable Company; SCI Holdings, Inc; SCI Cable Partners; Knight-Ridder Tribune News Service; Fort Wayne Newspapers, Inc.; and Fort Wayne Newspaper Agency.

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Respondents.

STATUTE INVOLVED

Petitioners did not include in their presentation of applicable statutes and regulations Section 1801 of the Newspaper Preservation Act, 15 U.S.C. § 1801, which reads as follows:

§ 1801. Congressional declaration of policy

In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this chapter.

SUMMARY OF REASONS WHY THE PETITION SHOULD NOT BE GRANTED

This case previously came before this Court on a motion by Petitioners for a stay pending disposition of their Petition for Writ of Certiorari. The stay was denied, and now the Petition comes before the Court for determination.¹

The Petition contains the same misstatements of fact and law that marred the motion for a stay. Petitioners persist in basing their claims upon a fundamental mischaracterization of the Attorney General's decision and the opinions below. The arguments have been reordered, but still raise no questions that are genuinely presented in this case, or indeed that could be resolved on this record. What is clear is that the Petitioners' dispute with the Attorney General is a narrow, factual one, raising no legal issues significant either to the administration of the Newspaper Preservation Act ("NPA") or to the proper standards for judicial review of agency decisionmaking.

As they have done at each stage of this case, Petitioners have again changed the focus of their attack. The new centerpiece of their argument is their assertion that the Court of Appeals gave excessive deference to a construction of the NPA that Petitioners claim was impermissibly "broad." Thus, their first "Question Presented" is as follows:

Does this Court's decision in *Chevron, USA v. Natural Resources Defense Council* . . . require a reviewing court to defer to an administrative agency's *expansive* construction of an exemption from the antitrust laws, *even if the court concludes that the agency's construction is at odds with the established rule that antitrust exemptions must be narrowly construed.* (emphasis added)

1. Following this Court's denial of the motion for a stay, The Detroit News' parent, Gannett Company, has chosen to delay implementation of the joint operating arrangement until this Court has ruled on the Petition for Writ of Certiorari. Gannett has stated publicly that it remains fully committed to the JOA, and the Free Press desires that the agreement be consummated at the earliest possible date.

In fact, the Attorney General's construction of the exemption is not "expansive," and *no* court in this case has concluded that it "is at odds with the established rule that antitrust exemptions must be narrowly construed." To the contrary, both the District Court and the Court of Appeals recognized, without dissent, that the Attorney General *expressly adopted* the settled construction of the NPA—one which had been formulated with specific regard to the canon.

Petitioners' second Question Presented also criticizes a decision that bears little resemblance to the one before the Court. Petitioners ask:

In determining whether two newspapers that are competitive equals qualify for an antitrust exemption under the Newspaper Preservation Act, which requires that one of them be in "probable danger of financial failure," may the Attorney General approve the application on the basis of a construction of the Act *that requires only (a) a showing that papers have lost money for several years, and (b) a representation by the "non-failing" paper that it will not raise its prices even if the exemption is denied?* (Emphasis added)

The premises upon which this question is based are incorrect. In this case the Attorney General *did not* approve the joint operating arrangement ("JOA") "only" on the basis of the two factors identified by Petitioners. Completely omitted from Petitioners' characterization of the decision is the wealth of record evidence that the Attorney General relied upon, much of it undisputed, demonstrating that the Free Press was in an intractable and worsening financial crisis and, indeed, would close absent a JOA.

Petitioners disagree with these conclusions, and, in an expansive but notably misleading and incomplete factual argument, invite the Court to reweigh the evidence and agree with them that the Free Press might survive without a JOA. The question in this case, however, is whether the Attorney General's conclusions were adequately supported on the record. Both the District Court and the Court of Appeals addressed this question at great

length and answered it in the affirmative, and no reason in law or policy exists to conduct that inquiry again.

In this case, the Attorney General approved a joint operating arrangement that he concluded, on the basis of substantial record evidence, was necessary to save the Free Press, and preserve editorial diversity for the people of Detroit. The Newspaper Preservation Act was passed precisely to serve such an end. Petitioners may have a profound distaste for the statute, and may disagree with Congress as to the harsh and unique economic realities of the newspaper industry. However, these complaints should be addressed to the Congress, and not to this Court. The Petition for Writ of Certiorari should be denied.

COUNTERSTATEMENT OF THE CASE

A. The Newspaper Preservation Act

Between 1920 and 1968, the number of American cities supporting two daily newspapers declined from 552 to 45, adding more than 500 American cities to the list of those having a newspaper monopoly. *See* 115 Cong. Rec. 15,661 (1969) (Sen. Inouye). This trend has continued. Since the statute was passed, second newspapers in Philadelphia, Cleveland, Baltimore, St. Louis, Buffalo, and Washington have closed—the *Washington Star*, for example, despite significant financial assistance from its corporate parent, Time, Inc.

Concerned by the pattern of financial failures of metropolitan newspapers, and convinced of the vital importance of news and editorial diversity to the free and open debate of public affairs, Congress undertook twenty years ago to study the problem and its possible solutions. What Congress found was a newspaper industry where “unique economic forces operate,”² making “it more likely for newspapers to fail when faced with competition than other businesses.”³ The cause of this instability was not a mystery. In the newspaper industry, critical advertising revenue

2. *Committee For An Independent P-I v. Hearst Corp.*, 704 F.2d 467, 480 (9th Cir.), *cert. denied*, 464 U.S. 892 (1983).

3. S. Rep. No. 535, 91st Cong., 1st Sess. 4 (1969).

depends upon circulation, which in turn depends upon advertising (as well as editorial) content. Newspapers are thus ordinarily impelled to compete vigorously for circulation and advertising market share, even if that means having to subsidize unprofitable operations.⁴ In 1970 Congress passed the Newspaper Preservation Act, 15 U.S.C. § 1801, *et seq.*, to save endangered newspapers from such ruinous competition, and thereby to preserve editorial diversity in the communities that they serve.

The NPA empowers the Attorney General to authorize newspapers in a given market to enter into a JOA—an agreement which permits competing papers to combine their circulation, advertising, and production functions so long as their reporting and editorial functions remain separate and independent. More particularly, the Attorney General is given sole discretion to approve a JOA upon finding that at least one of the two newspapers party to the agreement is a “failing newspaper”—that is, a newspaper “in probable danger of financial failure”—and that approval “would effectuate the policy and purpose” of the Act. 15 U.S.C. §§ 1802(5), 1803(b).

In passing the NPA, Congress intended a “total rejection” of the rule of *Citizen Publishing v. United States*, 394 U.S. 131 (1969), under which JOAs were only lawful if one of the newspapers qualified as a “failing company”—one demonstrably on the

4. The legislative history expressly contemplates that the ruinous effects of competition between newspapers might require “massive and continuing infusion of capital” to forestall a junior paper’s demise. 116 Cong. Rec. 1788 (1970) (statement of Senator Bennett, quoting publisher of the Honolulu Advertiser); *id.* 1787 (“price war conditions, promotional activities and premiums used as a means to maintain circulation or advertising, demonstrating inherent instability,” are hallmarks of a failing newspaper) (Sen. Bennett); *id.* 1791 (statement of publisher detailing how circulation of newspaper was improved “only by engaging in heavy promotion expenditures and reducing advertising rates to get volume to attract readers,” resulting in operating losses); *id.* 23,152-53 (when faced with severe financial difficulties publishers have been forced to “subsidize[] their newspapers” to avoid closure) (Rep. Matsunaga). *Accord*, Hearing before the House Antitrust Subcom. of the Comm. on the Judiciary on H.R. 279, 91st Cong., 1st Sess. at 10-11 (1969) (Rep. Matsunaga).

brink of financial collapse.⁵ See *Committee for an Independent P-I v. Hearst Corp.*, 704 F.2d 467, 473-74, 476 (9th Cir.), cert. denied, 464 U.S. 892 (1983) ("*Hearst*"). Congress deliberately chose to allow "newspapers to enter joint agreements before they reached th[at] point of distress." *Id.* at 474. Otherwise, with competition from the ailing paper doomed, there would be no incentive for the leading paper to agree to a JOA. See *id.* at 479 n.10.

Under the NPA, by contrast, the standard for determining whether a JOA applicant is a "failing newspaper" is whether the paper is suffering "losses which more than likely cannot be reversed." *Hearst*, 704 F.2d at 476. In making this determination, the Attorney General must assess the financial condition of the paper "regardless of its ownership or affiliations," 15 U.S.C. § 1802(5)—that is, to quote the Ninth Circuit, the "ailing newspaper should be analyzed as a free-standing entity, as if it were not owned by a corporate parent." *Hearst*, 704 F.2d at 480.⁶

The statute focuses on whether the newspaper is in "probable" danger of financial failure, and thus requires the Attorney General to exercise discretion in predicting likely competitive conditions and conduct. 15 U.S.C. § 1802(5). As Attorney General Smith ruled in the Seattle JOA decision sustained in *Hearst*, the "'danger of financial failure' must be assessed as a matter of probabilities, not certainties," and must be resolved on a "case-by-case" basis as new applications are filed. *Seattle A.G. Order*, 47 Fed. Reg. at 26,473-74.

5. Petitioners attempt (at 18) to minimize the significance of the *Citizen Publishing* requirement by saying merely that the NPA resolved "uncertainty" in application of the rule of that case to then-existing JOAs. In fact, the statute unambiguously repudiated the requirement that newspapers be "failing companies" for all JOAs, present and future. S. Rep. No. 535, 91st Cong., 1st Sess. 6 (1969).

6. Congress expressly rejected an amendment that would have eliminated the "regardless of ownership or affiliations" language and thus have permitted consideration of the financial condition of or support provided by the corporate parent. See 116 Cong. Rec. 23,177-79 (1970); 116 Cong. Rec. 1988-89 (Sen. Fong) and 2006 (Sen. Hruska) (1970).

B. Proceedings Before The Attorney General

The record before the Attorney General revealed that the Detroit Free Press had suffered massive and accelerating losses for most of the 1980's, and saw no prospect of returning to profitability. Detroit was a two-newspaper city, but could not long remain so. The Free Press had not made a profit in seven years, and its losses were dramatically escalating. Faced with an intractable financial dilemma, and kept alive only through a life support system of regular cash infusions totaling \$176 million from 1976 through 1986 from its corporate parent, Knight-Ridder, Inc., the Free Press succeeded in negotiating a JOA with The Detroit News. The Free Press saw the JOA as the only way to remain in publication, and save a substantial majority of the more than 2,100 jobs that would be lost if the paper closed. On April 11, 1986, the two papers executed the JOA, App. 31a,⁷ and submitted to the Attorney General an application for approval on May 9, 1986.

Exercising his discretion to do so (the NPA has no hearing requirement), the Attorney General referred the application to an administrative law judge ("ALJ") for preliminary fact finding and a "recommendation" as to disposition. See 28 C.F.R. §§ 48.8(c), 48.10(d). Both papers participated in administrative hearings as, by regulation, did the Antitrust Division. Six labor unions (representing more than 85% of Free Press employees) intervened in the proceeding, all of which ultimately supported approval of the JOA after concluding that in its absence

7. "App." refers to the Appendix filed by Petitioners with their Petition For a Writ of Certiorari.

the Free Press would close.⁸ JA 542-550.⁹ The Mayor of the City of Detroit similarly intervened, and similarly advised ultimately that he did not oppose the JOA. See JA 540-553. On December 29, 1987, the ALJ recommended that the application not be granted. Although the ALJ recognized that the Free Press could not through its own action restore itself to profitability, he speculated that in the absence of a JOA the News might spontaneously give up its long-standing fight for market leadership and raise its prices, thereby permitting the Free Press to follow suit. Recommended Decision of ALJ, App. 92a.

On August 8, 1988, in a careful fifteen-page review of the record evidence and applicable law, the Attorney General ordered that the JOA be approved. Expressly following the Ninth Circuit's interpretation of the NPA in the *Hearst* case, he concluded that the Free Press is "suffering losses which more than likely cannot be reversed," and thus qualifies as "failing newspaper" within the meaning of the NPA. App. 141a-42a. This conclusion was based upon a thorough review of the record and the critical recommended factual findings of the ALJ that the Free Press:

- (i) had lost over \$81 million from 1980 through 1986;
- (ii) suffers substantial competitive disadvantages in advertising and circulation in comparison to the News;¹⁰

8. The Free Press takes exception to Petitioners' unsubstantiated suggestion (at 8 n.3) that the labor unions misrepresented the basis for their support of the JOA to the Attorney General. All payments negotiated with the unions were severance and other ordinary course payments that typically would take place in the event of a reduction in work force. As stated in their filings with the Attorney General, the representatives of labor in this case recognized that a JOA in Detroit was necessary to preserve as many of their members' jobs as possible.

9. "JA" refers to the Joint Appendix filed by the parties in the Court of Appeals, a copy of which has been lodged with this Court by Petitioners.

10. Petitioners' suggestion that the Free Press and the News were "competitive equals" misstates the record. The News is the exclusive afternoon daily in Detroit, and has made significant inroads into the morning field. See ALJ 18, App. at 16a-17a. The News enjoys a particularly substantial advantage (a) in daily circulation in the primary market area (the area of greatest importance to

- (iii) is unable through any unilateral action to restore itself to profitability;
- (iv) has not brought itself to the brink of financial failure through improper marketing practices or culpable mismanagement;
- (v) had engaged in a fierce competitive struggle with the News since at least as early as 1973; and
- (vi) would have failed long ago had it not been for cash infusions of \$176 million by Knight-Ridder.

App. 76a-77a; 120a; 93a, 100a, 122a; 19a, 120a, 121a, 128a; 15a-16a; 81a-82a.

The Attorney General also specifically considered whether, despite these facts, the Free Press might continue to operate at a loss in the hope that the News might some day raise its prices and thus afford the Free Press flexibility to increase its prices, too. The Attorney General rejected this speculation because the News "has made clear that it has no intention of embarking on such a course, either unilaterally or in conjunction with" the Free Press—a strategy that "hardly reflects unsound business judgment" in light of the News' competitive ability to outlast the Free Press. App. 143a-44a. Furthermore, the Attorney General recognized that the same market forces that make it unduly risky for the Free Press to initiate a price increase apply as well to the News. As the Attorney General quoted the ALJ, "[s]ince neither the *Free Press* nor the *News* can raise circulation or

each paper's advertisers) and (b) in all aspects of Sunday circulation. See ALJ, App. 43a-45a, 48a, 49a, 52a-53a. The importance of these circulation advantages is reflected in substantial News leads in virtually every advertising lineage and revenue index. See ALJ, App. 61a-69a.

The JOA does provide for an equal split of profits after a period of preference for the News' owner. The Free Press is not without competitive strength; otherwise the News would not have agreed to enter into a JOA. The precise division of profits, however, reflects the relative staying power of the two papers' parent companies, and the fact that the News had no way of knowing how long Knight-Ridder might continue to maintain the cash life support system on which the Free Press depends for survival. See JA 232, 343-44, 349-350. In any event, these factors are irrelevant under the statute because the "failing newspaper" requirement is to be analyzed "regardless of its ownership or affiliations." 15 U.S.C. § 1802(5).

advertising prices without regard to what the other paper does, there is no completely unilateral course of action which *either paper* can pursue which would return it to profitability.” App. 140a (emphasis added).

The Attorney General also considered whether the Free Press had engaged in an improper management practice by competing for so-called “market dominance” or “domination” (that is, majority circulation and advertising market shares) with the expectation that losses incurred in the course of that competition might some day justify a JOA. Again referring to the ALJ’s recommended factual findings, the Attorney General determined that both papers had engaged in a vigorous contest of great duration in the good faith belief that market domination was required for survival and future profitability.¹¹ On that basis, the Attorney General rejected the notion that the Free Press “was principally pursuing any end other than market domination.” App. 146a. Furthermore, he refused to fault the paper for seeking a JOA, since that was nothing more than “considering and acting upon an alternative that Congress ha[d] created” in enacting the NPA. *Id.*

Taking all the facts together, the Attorney General concluded that the Free Press’ inability to reverse its operating losses “is not just speculative, or likely, but ‘probable.’” *Id.* 144a. In fact, based upon his analysis of competitive conditions in Detroit, he concluded, consistent with direct testimony from the Chairman of the Board of Knight-Ridder,¹² that without approval of the JOA it was “near certain” that the Free Press would close. *Id.* 146a.

11. See ALJ, App. 19a: Free Press and News “management believed that the goals of dominance and future profitability at the cost of near-term earnings were rational policies given the past history of many junior papers which had not been able to survive as the second paper in metropolitan area competition.” The ALJ specifically recommended that the Attorney General consider this business strategy “neutral” under the NPA, “neither penalizing nor rewarding” the papers for it. *Id.*, App. 128a.

12. The Attorney General did not give “undue weight” to this testimony. AG, App. 144a. Nevertheless, Petitioners quote the ALJ’s demeaning characterization of the testimony as a “witness stand bolt out of the blue.” Petition at 8. In fact, the testimony echoed other record evidence that Knight-Ridder specifically contemplated closure of the Free Press on separate occasions in 1982

C. Affirmance By The District Court

Less than 48 hours before the JOA was to become effective, Public Citizen Litigation Group, representing a hastily assembled organization of about 20 individuals who opposed the JOA, filed a complaint in U.S. District Court challenging the Attorney General’s decision. None of the plaintiffs had participated in the hearings before the ALJ. A thirty-day stay was entered to permit full briefing of the case.

On September 14, 1988, after briefing and oral argument, District Judge George H. Revercomb upheld the Attorney General’s decision on expedited cross-motions for summary judgment. Judge Revercomb found that the Attorney General’s approval of the JOA was neither arbitrary nor capricious, and was well within the authority specifically conferred on the Attorney General by the NPA to effectuate the statute’s “purpose and policy.” See App. 160a. Judge Revercomb held each of Petitioners’ points to be without merit, finding, among others things, that there was ample evidence to support the conclusion that the Free Press was a “failing newspaper” given the paper’s huge losses, inability to pursue any unilateral business strategy that could return it to profitability, and the likelihood that the paper already would have ceased publication had it not been for the “massive infusions of funds” from its corporate parent. App. 156a.

In this connection Judge Revercomb addressed at length and rejected Petitioners’ assertion that the Attorney General was required to presume that the News would raise prices if a JOA were denied. Among other things, to quote Judge Revercomb, “the Attorney General was not unreasonable in concluding that there is no reason to expect the News to raise its prices any time soon, considering that such a move would put at risk its narrow circulation advantage, which in turn could jeopardize its position as the financially healthier Detroit daily, and considering that the

and 1985. See JA 230, 348-49; Hearing Exhibit AX 514 of the Antitrust Division; Hearing Transcript at 1872-74.

management of the News has stated that it has no intention of raising prices." App. 157a.

D. Affirmance by the Court of Appeals

After expedited but extensive briefing and oral argument, the Court of Appeals affirmed the District Court's decision on January 27, 1989. Circuit Judge Laurence H. Silberman, joined by Circuit Judge Spottswood W. Robinson, III, concluded that the Attorney General's construction of the NPA—which it found mirrored that of the Ninth Circuit in *Hearst*—was a reasonable statutory interpretation. App. 168a. The court similarly found reasonable the Attorney General's application of that legal standard to the facts. *Id.* Among other things, Judges Silberman and Robinson found ample support for the Attorney General's conclusions that in the absence of a JOA the News would not likely raise prices, and that the Free Press would close. *Id.* 184a-86a.

In addition, the Court of Appeals rejected Petitioners' argument that the newspapers were guilty of disqualifying management practices by pursuing a price war in order to generate losses justifying a JOA. To quote the Court of Appeals, "the record of years of fierce competitive and consequent losses to both papers led the Attorney General reasonably to conclude that both papers were principally pursuing market domination and that their strategies had been followed before any mutual discussion of a JOA." *Id.* 189a.¹³

Circuit Judge Ruth Bader Ginsburg dissented, recommending not an outright reversal of the Attorney General's decision but that the case be remanded for further explanation. App. 191a.

13. The ALJ observed that "the opening salvo of the latest and most bitter phase of the great Detroit newspaper war" commenced in 1973, App. 16a, and that the Free Press' goal of seeking market dominance was firmly in place no later than 1979, App. 15a-19a, 76a-77a. Nevertheless, Petitioners state that the Free Press' struggle for market leadership began "subsequent[]" to a 1981 meeting at which the possibility of a JOA was discussed with the then-owners of the News. Petition at 7. Their suggestion that the Free Press' business strategy was devised as a means of obtaining losses to support a JOA with the News is thus incorrect. Indeed, the News was sold in 1986, with its former owners *never* having agreed to a JOA.

In a footnote reference, Judge Ginsburg questioned dictum in the majority opinion regarding the proper treatment of canons of statutory construction under *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Id.* 196a n.6. Contrary to Petitioners, however, Judge Ginsburg correctly recognized that issue was not dispositive in this case. She did not dispute that the Attorney General, in fact, applied the canon in question through his application of the *Hearst* standard. *Id.* 195a-96a.

The D.C. Circuit declined to rehear the case *en banc*. No judge adopted the views expressed in Judge Ginsburg's dissenting opinion. Instead, Chief Judge Wald, joined by Judges Abner J. Mikva and Harry T. Edwards (Judge Ginsburg did not join), questioned the Attorney General's conclusion that the News was unlikely to raise prices in the event a JOA was denied. *See id.* 205a-08a. Her opinion was based upon an argument that unlawful predatory conduct must have occurred for the papers to be in their present financial state (a presumption unsupported by a finding of the Attorney General or a recommended finding of the ALJ, and not advanced by Petitioners here). She also argued that the News was unlikely to continue its market share strategy because "standard economic principles" make continued below-cost pricing improbable. *Id.* 209a.

Judge Silberman, again joined by Judge Robinson, responded to Chief Judge Wald's arguments in a concurrence to the Circuit's denial of rehearing *en banc*. First, the panel observed that Congress had passed the NPA precisely because "standard economic principles" do not apply in the newspaper industry. *See id.* 201a. Indeed, Congress fully recognized the instability of two-newspaper markets, and the rationality of pricing (like that of both the News and Free Press) that is designed to prevent the potentially devastating and permanent loss of market share. Judges Silberman and Robinson also noted, among other things, that the allegation of predatory pricing was simply not part of the case. "[I]n a future case, a party might make the argument the

Chief Judge suggests," but that was "all the more reason to deny rehearing here." *Id.* 204a.

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

I. The Court Of Appeals' Decision Applied Settled Standards Of Judicial Review, And Will Not Have A Broad Impact On Antitrust Laws That Are Enforced By Administrative Agencies.

Petitioners' leading argument now is that the Attorney General, in conflict with the Ninth Circuit's decision in the *Hearst* case, failed to take into account the canon of construction that exemptions to the antitrust laws are to be narrowly construed, and that the Court of Appeals felt helpless under this Court's decision in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to correct his error. The claim that the Attorney General failed to take the canon into account misrepresents the Attorney General's ruling. And the suggestion that the Court of Appeals would have reversed had it thought itself free under *Chevron* to hold the Attorney General to application of the canon misrepresents the decision on review. Petitioners' argument, devoid of factual and legal support, does not warrant further review by this Court.¹⁴

There is no conceivable conflict between this case and *Hearst* because the Attorney General, in applying the NPA to the facts of this case, expressly followed the *Hearst* test. And there can be no conflict between the standard applied by the Attorney General and the canon of construction on which Petitioners rely—that

14. No judge who has reviewed this case has suggested that the Attorney General's application of *Chevron* causes his decision to conflict with *Hearst*. Judge Ginsburg, citing *Hearst* in her dissenting opinion, adverted to no such claimed conflict, and specifically noted that "[t]he Attorney General does not disavow 'the well-recognized rule that antitrust exemptions must be narrowly construed.'" App. 195a. And Chief Judge Wald's dissent from the denial of rehearing *en banc* does not rely on any such alleged conflict with *Hearst*; indeed, it does not even cite that case.

"exemptions to the antitrust laws are to be narrowly construed"—because the Ninth Circuit's test in the *Hearst* case was formulated with express regard for that canon, 704 F.2d at 473. See also *id.* at 477-78. Thus, in adopting the *Hearst* test—"Is the newspaper suffering losses which more than likely cannot be reversed?" (App. 142a), quoting 704 F.2d at 478—the Attorney General adopted a standard that comports in all particulars with every requirement of law.¹⁵

Thus, there is no *Chevron* issue in this case. The Court of Appeals did not consider the Attorney General's decision to represent "a significant departure from past interpretations of the NPA," Petition at 14, and did not affirm that interpretation through allegedly excessive deference. To the contrary, the Court of Appeals expressly recognized that the Attorney General's construction of the NPA paralleled that in *Hearst*, adding that the standard applied by the Attorney General, one embraced by a sister circuit as the statute's "commonsense construction," would only be overturned for "cogent reasons." App. 179a. The District Court reached a similar conclusion. See App. 156a.

There also is no support for Petitioners' implied contention that any interpretation of the NPA that permits approval of the JOA here must be a "broad" one. The facts are otherwise. Saving the Free Press in the circumstances presented in Detroit, as the Attorney General concluded, would implement the central mission of the NPA. See App. 146a-47a. Petitioners claim (at 18) that the Attorney General's decision "emasculates" the Act. But it is Petitioners who would ignore the purpose of the NPA. As the Ninth Circuit cautioned in *Hearst*: "Simply put, we will not emasculate the Act in the guise of narrowly construing it." 704 F.2d at 483.

15. It may be worth noting that the Ninth Circuit in *Hearst* arrived at its construction of the NPA taking into account both the less rigorous statutory test for pre-enactment JOAs (which does not apply here), as well as the Bank Merger Act. See 704 F.2d at 474, 476-77. Petitioners, therefore, err in suggesting (at 18-19) that the Attorney General's decision disregarded those authorities as well. See also App. 142a.

Similarly, Petitioners err in asserting that *dictum* by the Court of Appeals concerning the treatment of canons of construction under *Chevron* misstates the law. The Court of Appeals concluded that *Chevron* "precludes courts picking and choosing among various canons of statutory construction to reject reasonable agency interpretations of ambiguous statutes," unless "an accepted canon" demonstrates "that Congress had a specific intent on the issue in question." App. 180a. (Emphasis in original). This is precisely the limited use of canons of construction authorized by *Chevron* for the review of agency decisions. As this Court stated in *Chevron*, 467 U.S. at 843 n.9, "If a court, employing traditional tools of statutory construction, ascertains that the Congress had an intention on the precise question at issue, that intention is the law and must be given effect." Here, the Court of Appeals concluded, there was no such specific intent. In fact, Congress had expressly conferred upon the Attorney General discretion to interpret the purposes of the NPA and make decisions that best effectuate those purposes. See 15 U.S.C. § 1803(b).

None of the cases cited by Petitioners suggests that the Court of Appeals departed from settled law. Petitioners characterize their lead case on this question, *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726 (1973), as one in which Congress' intent could not be discerned, and an agency's statutory interpretation was rejected upon application of a canon of construction. See Petition at 15. But this Court in *Chevron* concluded otherwise, characterizing *Seatrain* as a case where an administrative construction was contrary to "clear congressional intent" discernible through application of "traditional tools of statutory construction." 467 U.S. at 843 n.9. Accord, *Niagra Frontier Tariff Bureau, Inc. v. United States*, 826 F.2d 1186,

1190-91 (2d Cir. 1987).¹⁶ The Court of Appeals' decision specifically adopts this reasoning—indeed, repeats it almost verbatim—and thus cannot possibly be seen to be in conflict with the Court's precedents.

Finally, Petitioners for the first time suggest that the panel's decision conflicts with this Court's statement in *United States v. First City National Bank*, 386 U.S. 361, 367 (1967), (interpreting the Bank Merger Act of 1966), that "in antitrust actions involving regulated industries, the courts have never given presumptive weight to a prior agency decision, for the simple reason that Congress put such suits on a different axis than was familiar in administrative procedure." *Id.* at 367. This untimely argument has no merit. The "simple reason" cited by the Court in *First City National Bank* is not applicable here; this is not even an antitrust suit, let alone one involving a regulated industry. Indeed, the Attorney General's decision does not address any antitrust-related issues whose final resolution the federal judiciary has traditionally maintained are within its province. *Id.* at 369.¹⁷ If Petitioners are contending that decisions of the Attorney General under the NPA are entitled to no real deference at all, they are taking a position in conflict with *Hearst*, 704 F.2d at 471-73, and making a frontal assault on *Chevron* that cannot at this late stage be condoned.

16. The other two cases cited by Petitioners (at 14) for the proposition that exemptions to antitrust laws are to be strictly construed did not involve a court's review of agency action and are irrelevant to the question at issue. See *Square D. Co. v. Niagra Frontier Tariff Bureau*, 476 U.S. 409 (1986); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979). The cases cited by Petitioners concerning other canons of statutory construction (at 17) involve situations in which canons either proved irrelevant to the case, see *Amoco Production Co. v. Gambel*, 480 U.S. 531, 555 (1987); *Immigration and Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987), or were applied to demonstrate that Congress indeed had an intent on the issue in dispute, see *Bowen v. American Hosp. Ass'n.*, 476 U.S. 610, 644 n.33 (1986); *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 369-70 (1986); *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986).

17. Significantly, the Bank Merger Act also specifies that the court in an antitrust action under the statute "shall review *de novo* the issues presented." 12 U.S.C. § 1828(c)(7)(A). No comparable provision exists under the NPA.

II. This Case Does Not Present A Significant Issue Regarding Construction Of The Newspaper Preservation Act.

Secondarily, Petitioners claim that the Attorney General's decision establishes a right to a JOA merely where one paper has sustained losses for "several" years and where officials of the other paper are "willing" to testify that they will not raise prices if the JOA is denied. *See* Question Presented No. 2; Petition at 20. The decision, Petitioners contend, is thus a "roadmap" that "any organization" with "adequate" resources could follow to obtain a JOA, threatening the "independence" of second newspapers in 25 cities. Petition at 13, 20.

Petitioners' apocalyptic interpretation of the Attorney General's decision is indefensible. That decision does not, even implicitly, establish a two-factor test to be applied for all, or even any, future JOA applications. To the contrary, the Attorney General expressly engaged in a fact-specific evaluation of the long competitive battle between the Free Press and the News, and, following a thorough review of the record, reached a sound conclusion as to the likely outcome of that competition absent a JOA.¹⁸

The Attorney General's conclusion was based not upon the two trivialized factors recited by Petitioners, but upon a wealth of record evidence, including: years of vigorous competition between the Free Press and the News for leadership in Detroit, seven years of increasing losses suffered by the Free Press, the undisputed absence of any unilateral business strategy that could return the Free Press to profitability, \$176 million spent by Knight-Ridder

18. Petitioners try to make much of the Attorney General's adoption of the ALJ's fact findings, as if that made his contrary evaluation of those facts somehow incomprehensible. There is no difficulty, however, with the Attorney General accepting the ALJ's fact findings, but stating simply that he differed with the ALJ's "ultimate conclusion as to where those facts lead." App. 147a. And, significantly, as the Court of Appeals observed, the Attorney General's difference with the ALJ is "clear throughout the opinion." App. 189a. Of course, it is the Attorney General's conclusions that are on review, not the ALJ's, whose predictions the Attorney General was free under the NPA to accept or reject as he saw fit. *See* 28 C.F.R. § 48.14(a); App. 184a (Decision of the Court of Appeals).

to keep the Free Press in the battle—without which the paper would have closed long ago—and the inability of the Free Press or the News to raise prices without risking catastrophic loss of market share. These facts clearly demonstrate that the Free Press is a failing newspaper whose preservation through approval of a JOA will serve the NPA's purpose "of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States." 15 U.S.C. § 1801. If this is a "roadmap" for approval of a JOA under a statute specifically enacted to protect endangered newspapers from extinction, so be it.

On this record there is no basis for Petitioners' argument that approval of the Detroit JOA will permit a "deep pocket" company to incite a price war in order to force its competitor into a JOA.¹⁹ Such conduct would find no precedent in the facts of this case. Although Petitioners persist in suggesting that the Free Press' losses were artificially created, making approval of the JOA improper, *see, e.g.*, Petition at 7, 20-22, ultimately they concede that the losses suffered by the Free Press were the product of "vigorous competition." Petition at 12. Nor did the ALJ recommend disapproval of the JOA because of any alleged improper motive in the conduct of the two papers. Indeed, he acknowledged that, given the well-known demise of junior papers across the country, the managements of the Free Press and the News "believed that the goals of dominance and future profitability at the cost of near-term earnings were rational policies." App. 19a. The Attorney General similarly concluded that the principal motivation of the parties was legitimate competition, as did the District Court and the Court of Appeals. *See* App. 145a-46a; 160a-61a; 190a n.13. *See also* n. 13, *supra*.

19. Petitioners repeat in passing their allegation that the Attorney General's decision may condone or encourage predatory pricing. Petition at 20 n.6. Of course, there has been no finding of predatory conduct by either party in this case. And the competitive battle in Little Rock, which Petitioners mention in a footnote, reveals no such conduct on the part of the News' parent, Gannett, as is discussed more fully in Gannett's filing in the Court of Appeals, which appeared as Exhibit D to the Free Press' Opposition to Petitioners' Motion For A Stay.

Moreover, the conduct feared by Petitioners would find no safe harbor under the decision below. That decision expressly excludes from its scope the very hypothetical posed by Petitioners, for the good and sufficient reason that it was not presented by the facts. As the Court of Appeals put it: "We need not consider the hypothetical situation where the initial and principal motivating factor behind a price war is the prospect of a future JOA. The Attorney General was reasonable to conclude that this record did not present such a situation." App. 190a n.13.

Indeed, this Court should accept Petitioner's incantation of dire consequences for the NPA from the decision below with great skepticism. The statute has worked well as applied by attorneys general for almost twenty years. It has been infrequently invoked; the Detroit JOA was only the fifth to have been sought. And it has been litigated even less frequently; this is only the second case challenging approval of a JOA to have reached a court of appeals. Moreover, every decision by the Attorney General under the statute by its nature is limited to its facts. As Attorney General Smith observed in the Seattle JOA decision affirmed in *Hearst*, each JOA application must be evaluated on a "case-by-case" basis. See 47 Fed. Reg. 26,474. That is an independent exercise of judgment that neither this case nor any other can predetermine.

What more, then, would Petitioners have had the Attorney General require before approving a JOA? At times they appear to argue that the "failing newspaper" must actually to be in a "downward spiral." See Petition at 21. But this reading of the statute understandably has been specifically disavowed by Petitioners, App. 179a n.7, and is not presented as an issue for this Court's resolution. There is no requirement of a "downward spiral" to be found in the statute's language, legislative history,²⁰ or judicial construction, see *Hearst*, 704 F.2d at 478.

20. The legislative history confirms that the goal of Congress was to protect generally "newspapers in competitive difficulty." S. Rep. No. 535, 91st Cong., 2d Sess. 3-4 (1969). Indeed, there is no reference in the final Senate or House Report to "downward spiral." The sponsors of the legislation specifically intended the "failing newspaper" test to look to all the circumstances of each

For all their posturing as to the dire consequences of the Attorney General's decision, Petitioners' disagreement with it reduces to a narrow factual dispute: whether the Attorney General was arbitrary and capricious in concluding that, if the JOA were denied, the News would raise prices. Petition at 10, 20, 22.

Contrary to the conclusion of the District Court and the Court of Appeals, Petitioners seem to assert that the Attorney General was *required* to presume that absent a JOA the News would soon raise prices and thereby enable the Free Press to remain in business by following suit. See, e.g., Petition at 20, 22. This goes far beyond even the ALJ's speculation that, absent a JOA, the News "may eventually" raise prices. App. 92a; 132a. Petitioners rely upon the theory that the Detroit market might support two daily newspapers at some hypothetical level of pricing. But the possibility that two newspapers, in the absence of competition, could fix prices at such a level that both might remain profitable is clearly beside the point, as both the Attorney General and the Court of Appeals recognized. See App. 143a; 188a. As the Attorney General stated, no such actions could be achieved by the Free Press without "entirely improper collusion or collaboration with the News." App. 145a.

Petitioners also rely upon Chief Judge Wald's view that "standard economic principles" dictate that two newspapers would price as to permit both to survive. See Petition at 22; App. 209a. However, "standard" economic principles describing how businesses in typical industries might be expected to compete have no application here. Indeed, the very failure of such principles to operate in the newspaper business is what prompted passage of the NPA itself, and what explains why there have been so many

individual case and not to turn on the "downward spiral" or any predetermined bright-line test. See 116 Cong. Rec. 1786 (1970) ("factors . . . to be considered . . . in determining whether a newspaper is failing would vary with the particular circumstances of the newspapers involved") (Sen. Bennett); *id.* 1788 (similar) (Sen. Fong). Thus, in the Seattle JOA case, Attorney General Smith emphasized that Congress left "the determination whether a newspaper is 'failing' to be made case-by-case, based upon a weighing of all relevant factors and without application of particular *per se* rules." 47 Fed. Reg. at 26,474.

newspaper failures in once competitive metropolitan markets. See pp. 4-5, *supra*.

As the ALJ, the Attorney General, the District Court, and the Court of Appeals all recognized, neither the Free Press nor the News could raise prices unilaterally without risking competitive disaster. App. 93a, 100a, 122a; 143a, 145a; 156a; 185a. For the News to take such a risk if the JOA were denied, with victory in its battle with the Free Press at last in hand, would make no sense. Direct testimony from executives of both companies supported this conclusion. None supported the contrary assertion that Petitioners say the Attorney General was required to accept. Adoption of Petitioners' economic theories would thus fly in the face of the history of newspaper competition in the United States and, to quote the Court of Appeals, "the premise of the statute itself." App. 201a.

In sum, the intractable financial dilemma faced by the Free Press was not manufactured. It developed literally over decades, and despite the best efforts of the Free Press and Knight-Ridder to improve the paper and make it more attractive to readers. The Free Press pursued what it reasonably believed was the only strategy that could ensure its survival, consistent with the economic views of the industry embedded in the NPA itself. The Court of Appeals' decision stands for no more than the fact that the Attorney General reasonably believed that in these circumstances approval of a JOA was indeed consistent with Congress' goals.

* * *

The basic facts in this case are simply stated: if the JOA is approved, the Free Press and the News will merge their advertising, production, and distribution functions, with substantial economies resulting, and will operate at a profit, thereby enabling both papers to continue to provide the public separate editorial and reportorial services and opposing philosophies and ideologies. On the other hand, if the JOA is denied, the Free Press will close as a consequence of fierce competition and financial failure, and the News will have a total and complete monopoly.

In these circumstances, approval of the JOA was an unassailably correct decision and, as both the District Court and the Court of Appeals confirmed, one that was soundly based on the facts and in complete harmony with the purposes of Congress.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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